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No. 613

# In the Supreme Court of the United States

October Term, 1970

WILLIAM H. SOSNA, PETITIONER

v.

LIEUTENANT GENERAL LEWIS B. HERSHEY,
DIRECTOR, SELECTIVE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 10 |


## CITATIONS


Cases:

| | |
|---|---|
| *Even* v. *Clifford*, 287 F. Supp. 334 | 9 |
| *Fox* v. *Brown*, 402 F. 2d 837 certiorari denied, 394 U.S. 938 | 8 |
| *Karpinski* v. *Resor*, 419 F. 2d 531 | 8 |
| *Olsen* v. *United States*, 423 F. 2d 925 | 9 |
| *Quaid* v. *United States*, 386 F. 2d 25 | 6, 9 |
| *Schwartz* v. *Franklin*, 412 F. 2d 736 | 8 |
| *United States* v. *Lonstein*, 370 F. 2d 318 | 9 |
| *Winters* v. *United States*, 281 F. Supp. 289, affirmed *per curiam*, 390 F. 2d 879, certiorari denied, 393 U.S. 896 | 8, 9 |
| *Winters* v. *United States*, 412 F. 2d 140, certiorari denied, 396 U.S. 920 | 8 |

Statutes:

| | |
|---|---|
| 10 U.S.C. (Supp. V) 673a | 2, 4, 5, 6, 7, 8 |
| 50 U.S.C. App. 456(c)(2)(D) | 2–3, 9 |

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 612

WILLIAM R. SCAGGS, PETITIONER

*v.*

LIEUTENANT GENERAL STANLEY LARSEN,
COMMANDING GENERAL, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1) is reported at 423 F. 2d 1224. The district court issued no opinion.

### JURISDICTION

The judgment of the court of appeals was entered on April 7, 1970. On June 24, 1970, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including September 4, 1970. The petition for certiorari was filed on August 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



407-905—70

## QUESTIONS PRESENTED

1. Whether petitioner, an Army reservist who failed to join a reserve unit as directed, was entitled to an administrative hearing prior to being ordered to active duty for that reason.

2. Whether the provisions of 10 U.S.C. 673a, enacted by Congress after petitioner had enlisted in the Army, could be invoked to order petitioner to serve on active duty for failing, after the enactment, to participate satisfactorily in his reserve unit.

## STATUTES INVOLVED

10 U.S.C. (Supp. V) 673a, provides:

> (a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
>
> (2) has not fulfilled his statutory reserve obligation; and
>
> (3) has not served on active duty for a total of 24 months.
>
> (b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

* * * * *

50 U.S.C. App. 456(c)(2)(D) provides:

> Notwithstanding any other provision of this Act, the President, under such rules and regu-

> lations as he may prescribe, may provide that any person enlisted or appointed after October 4, 1961, in the Ready Reserve of any reserve component of the Armed Forces * * *, the Army National Guard, or the Air National Guard, * * * who fails to serve satisfactorily during his obligated period of service as a member of such Ready Reserve or National Guard or the Ready Reserve of another reserve component or the National Guard of which he becomes a member, may be selected for training and service and inducted into the armed force of which such reserve component is a part, prior to the selection and induction of other persons liable therefor.

## STATEMENT

Petitioner, a member of the Army Reserve, brought this habeas corpus action seeking release from the restraint allegedly imposed upon him by virtue of his being called to active duty. On September 30, 1963, petitioner had enlisted in the Army Reserve (Complaint, p. 2),[1] obligating himself to serve satisfactorily until the expiration of his six-year term of enlistment on September 30, 1969 (Pet. 6). Under the terms of his contract, failure to serve satisfactorily would subject him either to an order to perform active duty for a period of forty-five days (Complaint, p. 2) or to being reported to the Selective Service System for priority induction for two full years of active duty (Pet. 12–13).

After serving three months on active duty for train-

[1] "Complaint" references are to the pages of the Petition for Habeas Corpus filed in the district court. "Affidavit" references are to the pages of the affidavit attached to that petition.

ing (Pet. 7), petitioner was assigned to various control groups (Pet. 7) and was relieved of the obligation to attend weekly drills or annual training periods (Affidavit, pp. 1, 5). In January 1969, however, petitioner, who was then assigned to but not actively participating with a unit in Texas, was ordered to join by April 11, 1969 a unit in the San Francisco area, where he was then residing. Failure to join the unit, he was warned, would result in his being ordered to active duty for a period of twenty-four months, with credit for any periods of active duty already served (Affidavit, pp. 1–2).

Petitioner asserted that he diligently sought to join a reserve unit in the San Francisco area (Complaint, p. 3). He maintained that he was rejected because his employment as a musician required him to be free to travel throughout the United States and Europe and would thus interfere with his attendance at drills (Complaint, pp. 2, 3; Affidavit, p. 5).[2] As petitioner thus did not join a reserve unit by the required date, he was ordered, on June 10, 1969, to report for active duty for 18 months and 24 days[3] pursuant to 10 U.S.C. 673a (Complaint, p. 2; Pet. 8).

On July 24, 1969, petitioner filed a petition for a

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[2] Petitioner asserted that an additional ground for his rejection was that he had only five months to serve prior to the expiration of his term of enlistment (Complaint, p. 3). However, the affidavit he filed in the district court makes it clear that the ultimate obstacle was his asserted musical obligations.

[3] Petitioner was apparently credited with over five months of previous service on active duty.

writ of habeas corpus, asserting that the order calling him to active duty was invalid because (1) it was issued without a hearing; (2) it extended his enlistment contract beyond its original expiration date; (3) the Army's refusal to grant him a discharge because of "the conflict between the requirements of his occupation and the desires of the Army" was arbitrary and unreasonable and constituted a violation of due process; (4) the refusal of the reserve units to accept him "by reason of his occupation and the necessary demands of his occupation upon his time * * *" was invalid; and (5) 10 U.S.C. 673a was unconstitutional insofar as it authorized ordering him to active duty for a period in excess of forty-five days (Complaint, pp. 3–4). The district court denied petitioner's application for a restraining order and denied relief on the merits.

On July 28, 1969, petitioner sought a writ of habeas corpus and a restraining order from the court of appeals, which treated the petition as an appeal from the district court order and refused to issue a restraining order. On August 5, 1969, Mr. Justice Douglas ordered that the petitioner be released from all military custody and from compliance with the order requiring that he report to active duty, pending a determination of the merits by the court of appeals. 396 U.S. 1206. The court of appeals subsequently affirmed the district court order denying relief to the petitioner, but stayed its mandate pending the filing and disposition of the present petition for certiorari.

ARGUMENT

The decisions below are correct. There is no conflict of decisions, and thus no warrant for further review.

1. Petitioner's first contention is that the failure of his military superiors to afford him a hearing prior to ordering him to active duty invalidates that order.[4] That same contention has been squarely rejected in *Quaid* v. *United States*, 386 F. 2d 25, 27 (C.A. 10). In any event, for the reasons set forth below, this case presents no occasion for this Court to consider whether there are any circumstances in which military authorities must hold hearings prior to issuing orders to those already subject to military jurisdiction.[5]

The statute under which petitioner was ordered to active duty authorizes the issuance of such an order to any reservist who is either "not assigned to" or "not * * * participating satisfactorily in" a reserve unit. 10 U.S.C. (Supp. V) 673a. The very allegations petitioner made in the district court show that the reason for his failure to meet either of these requirements was his insistence that he would be unable to attend

[4] Petitioner raises no claim, and raises none in the court of appeals, that the failure of the district court to afford him an evidentiary hearing on his petition for habeas corpus was erroneous. Because no such hearing was held in the district court, the record consists only of papers filed by the petitioner, which do not include copies of his enlistment agreement, his enlistment record, or the documents leading to and reflecting the issuance of the activation order.

[5] Petitioner's reliance on the selective service cases (Pet. 9–12) to support the view that such a hearing was required is misplaced. His status as a member of the military services renders his claim to a pre-activation hearing significantly less compelling than a draftee's claim to a pre-induction hearing.

weekly drills because of the competing demands of his employment as a musician. Those demands, of course, cannot justify his failure to fulfill his voluntarily assumed military obligations.

Contrary to petitioner's assertion (Pet. 14–15), the decision below is not in conflict with the decisions of other courts of appeals. At most, the cases he relies upon indicate that a district court—not the military authorities—should hold a hearing to determine whether there is a "basis in fact" for a determination resulting in the activation of a reservist. As already stated, petitioner does not complain of the district court's failure to hold a hearing, and the circumstances did not require one.

Finally, even if petitioner's claim to an administrative hearing in the context of this case has merit, it would present no question of prospective significance. For, as petitioner recognizes, the Army Reserve has recently instituted new appeal procedures for contesting a determination of unsatisfactory performance (Pet. 8, n. 1; Pet. App. B, pp. ii–iii). While these procedures do not provide for a hearing, they do afford an opportunity to submit explanations and additional appropriate documents.[6]

2. Petitioner's remaining contention (Pet. 12–14, 15–16) that his activation under 10 U.S.C. (Supp. V)

[6] Since petitioner's claim to a hearing is not well-founded, we need only note that there is substantial doubt that petitioner was in the "custody" of any official in the Northern District of California, so as to permit the issuance of a writ of habeas corpus, when, prior to entering on active duty, he brought this action (see opinion of Mr. Justice Douglas on motion for stay, 396 U.S. 1206).

673a violates his enlistment agreement, was correctly rejected by the courts below. This is essentially the same contention that was made and rejected in *Winters* v. *United States*, 281 F. Supp. 289 (E.D.N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, 393 U.S. 896; *Fox* v. *Brown*, 402 F. 2d 837 (C.A. 2), certiorari denied, 394 U.S. 938; *Karpinski* v. *Risor*, 419 F. 2d 631 (C.A. 3); *Schwartz* v. *Franklin*, 412 F. 2d 736 (C.A. 9); *Winters* v. *United States*, 412 F. 2d 140 (C.A. 9), certiorari denied, 396 U.S. 920.

Petitioner voluntarily enlisted "under the conditions prescribed by law"[7] and, as several cases have made clear, the "conditions prescribed by law" include future laws as well as laws in effect at the time of enlistment. See, *e.g.*, *Winters* v. *United States*, *supra*, 281 F. Supp. at 295–296; *Fox* v. *Brown*, *supra*, 402 F. 2d at 841; *Johnson* v. *Powell*, 414 F. 2d 1060, 1065 (C.A. 5). Thus, among the "conditions prescribed by law" were the provisions in 10 U.S.C. (Supp. V) 673a that "[n]otwithstanding any other provision of law," a reservist not assigned to a reserve unit or not participating satisfactorily in his reserve unit "may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment * * * would expire before he has served the required period under this section, it may be extended until he has served the required period." Petitioner

[7] As noted above (n. 4, *supra*), petitioner's enlistment agreement and record were not filed in the district court. We have examined petitioner's enlistment record, however, and it is in the usual form which provides that he was enlisting "under the conditions prescribed by law."

was properly called to active duty under this provision. *Winters* v. *United States, supra.*

Moreover, under the law at the time of petitioner's enlistment and as it currently stands (50 U.S.C. App. 456(c)(2)(D)), a reservist whose performance of his reserve obligation has been unsatisfactory is subject to induction into the Armed Forces on a priority basis by his local draft board. Such induction may be ordered at any time during the reservist's six-year enlistment, and the reservist may be required to serve two full years, since the period of such service need not be reduced to give credit for prior active duty. Consequently, there has always been statutory authority, although not in fact employed here, to call up petitioner for a full two years of active duty rather than the nineteen months he has been called upon for under 10 U.S.C. 673a. See *Winters* v. *United States, supra,* 281 F. Supp. at 292.[8]

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[8] Petitioner's contention (Pet. 13) that he would have enjoyed greater procedural rights had he been reported for induction to his local draft board pursuant to the provisions of 50 U.S.C. App. 456(c)(2)(D), is erroneous. The procedural right which he seeks to vindicate here—*i.e.*, his right to a hearing on whether the conditions justifying his activation were met—would not be available to him under this alternative procedure. *United States* v. *Lonstein*, 370 F. 2d 318 (C.A. 2); *Eren* v. *Clifford*, 287 F. Supp. 334 (S.D. Cal.). The decisions upon which he relies, *Quaid* v. *United States*, 386 F. 2d 25 (C.A. 10) and *Olsen* v. *United States*, 423 F. 2d 925 (C.A. 9), hold only that the draft board to which a reservist is certified for induction must pass on his claim of conscientious objection, and not that draft boards are permitted to question the validity of the certification itself.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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